In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH L. CARBONE, VINCENT DINUNNO, JOHN STROPPARO, AND WANTEE HUHTANEMI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

(Filed August 30, 1945)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on August 1, 1945. The petition for appeal was filed on August 30, 1945, and is presented to the District Court herewith, to wit, on the thirtieth day of August 1945.

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JURISDICTION

The jurisdiction of the Supreme Court to review by further appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 1 of the Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. 276b, commonly called the Kickback Act, provides:

> That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

THE ISSUE AND THE RULING BELOW

The defendant—Joseph L. Carbone, Wanrer Hultaniemi, John Stropparo, president, financial secretary, and treasurer, respectively, of Local 39 of the International Hod Carriers' Building

and Common Laborers Union of America, and Vincent DeNunno, president of the Eastern Massachusetts Laborers District Council and an employee of Local 39—who, by virtue of their positions and connections with the Local, made a scheme hereinafter described below with two contractors engaged jointly in the construction of various public buildings for the United States at Fort Devens, Massachusetts, were indicted on March 17, 1941, for conspiracy to violate the Kickback Act by inducing certain persons employed in the construction of such public buildings, financed in whole by grants from the United States, to give up part of the compensation to which they were entitled under their contracts of employment, by force, intimidation, threat of procuring dismissal from such employment, and by other means. The details of the conspiracy, which is alleged to have continued from October 1, 1940, to March 31, 1941, are set forth in the indictment as follows:

On October 16, 1940, about one month after the signing of the contract for the construction at Fort Devens, Massachusetts, the defendants made an agreement with the contractors whereby the latter undertook to employ as laborers only such persons as were approved by the defendants and to discharge any such employees at their request. The contractors also agreed to employ forty persons named by the defendants, known as stewards, who were to perform such duties as the

defendants should direct, and to provide an office for the defendants on the site of the construction. Approximately 7,500 laborers were employed by the contractors in the course of such construction. Following this agreement, the defendants approved to the contractors for employment as laborers only members of Local 39, which, in September 1940, had about 100 members, or of other locals of the International Union, and only such other persons as paid to the defendants the sum of $5.00. The defendants represented to the latter that this payment would be regarded as an installment upon the initiation fee of Local 39 and the International Union and that each such employee would be required to pay the defendants $5.00 per week until the total initiation fee was paid or he would not be permitted to continue to work.[1] The form of receipt given to the laborers for the initial and subsequent weekly payments was in the name of Local 39, by defendant Carbone as "Business Representative," and contained spaces for the date and total amount paid by the individual. The form recited: "This receipt is good for one week from date." Each week the defendants directed the stewards to go among the laborers and demand of each non-member of the union either that he display a receipt showing that he had paid $5.00 for the current week or that he immediately pay such sum to the steward

[1] The initiation fee was originally $50.00, but it was later reduced to $40.00 and then to $25.00.

or the defendants under threat of procuring the laborer's dismissal from employment if he did not do so. The defendants were able to carry out this threat by reason of their agreement with the contractors, and they knew and intended that the laborers would pay the $5.00 weekly payments out of the compensation to which they were entitled by virtue of their employment.

The defendants kept no records of these payments to them, except that if a laborer should present receipts showing payment of the initiation fee in full, his name was recorded and sent to the headquarters of the International Union with the sum of $5.35, representing the share of the fee to which the International was entitled under its rules. Neither did the defendants report to Local 39 or to any one the amounts received from laborers paying less than the full amount of the initiation fee, nor did they cause such sums to be recorded in the Financial Secretary's books as the rules of the International required. The defendants knew that the majority of the laborers who paid the initial sum of $5.00 would not and did not complete payment of the full initiation fee. In all these transactions whereby the defendant, acting in agreement, induced the laborers to give up part of the compensation to which they were entitled, they represented that they were acting for Local 39 and the International, at the same time concealing from those organizations the sums they thus col-

lected from laborers who did not pay the initiation fee in full.

The defendants filed motions to dismiss the indictment on the ground that it does not state an offense cognizable in law.

In granting the motions to dismiss, the District Court held that the Kickback Act applies only to employers or those "vested by the employer with power to fix and terminate the employer-employee status"; that the power of union officials to demand the discharge of any worker who refuses to meet union requirements is "not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a collective bargaining agreement"; that neither the history nor the purpose of the Kickback legislation "warrants an extension of its scope to include these defendants." The Court thus construed the Kickback Act as not embracing the activities of union officials who use their power to exclude persons from employment as a means of personal enrichment.

Since the District Court ruled that the facts alleged in the indictment do not fall within the purview of the Kickback Act, the Court construed the statute, and the ruling is subject to review by the Supreme Court on direct appeal. *United States* v. *Lepowitch*, 318 U. S. 702, 703; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States*

v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Kettel*, 211 U. S. 370.

THE QUESTION IS SUBSTANTIAL

The decision of the district court in effect holds that union officials are *ipso facto* immune from prosecution under the Kickback Act, even though, under color of union activity, they induce a person engaged upon a federal project to give up part of his compensation, not for union purposes, but for the personal enrichment of such officials. The importance of this question to large numbers of laborers engaged in the federally financed public construction programs is obvious. We submit that the construction given to the statute by the district court is inconsistent with its language and with the principles enunciated by the Supreme Court and lower federal courts.

1. The indictment alleges that the contractors entered into an agreement with defendants whereby "the contractors undertook to employ as laborers on said construction only those who were approved by the defendants and to discharge any of those thus employed at the request of the defendants." The indictment therefore alleges in substance that the employers delegated to the defendants their own authority to make controlling decisions in respect of employment. Defendants were thus in much the same position as the fore-

man held subject to the Act in *United States* v. *Laudani*, 320 U. S. 543. Substantially similar indictments have been sustained on such theory in *United States* v. *Fuller*, 51 F. Supp. 951 (N. D. N. Y.), and *United States* v. *Lombard*, 54 F. Supp. 537 (W. D. N. Y.).

2. We do not believe that the *Laudani* decision, *supra*, has the effect, which the district court accorded to it, of limiting the statute solely to employers or persons acting directly as their agents. The language of the statute punishing "whoever" exacts a kickback "by threat of procuring dismissal" from employment, "or by any other manner whatsoever," indicates a broader sweep. We think that the statute requires at most a direct relationship between the employment and the exaction of compensation by illegal means. Such a direct relationship was clearly averred by the allegations of the indictment that, if a worker did not show membership in the union or a receipt showing the payment of $5.00 for the current week, the payment would be demanded "under threat of procuring dismissal from his employment if he did not pay the five dollars; which threat the defendants were able to carry out by reason of their * * * agreement with the contractors, the defendants well knowing and intending that the laborers would pay the said five dollars out of the compensation to which they are entitled under their contracts of employment with the said contractor."

3. In its opinion the district court stated: "The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution." The indictment makes it clear, however, that the prosecution is not based on legitimate closed shop activities. It specifically alleges:

> And the defendants made no report to the Local 39, or to any one, of the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union required;—the defendants well knowing that the majority of those who paid the initial five dollars would not and did not complete the payment of the full initiation fee.

The gist of the offense here charged is that defendants were using an apparently legitimate device as a means of extorting kickbacks from persons employed on Federal projects. Proper labor union activities having the protection of federal legislation are manifestly not federal crimes, but a coloring of union activity does not, we submit, grant immunity to persons who commit acts specifically condemned by the statute

not for union purposes, but for their own personal enrichment. Cf. *Nick* v. *United States*, 122 F. 2d 660, 669–670 (C. C. A. 8), certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 715, where union officials acting for personal gain were convinced under the Federal Anti-racketeering Act (18 U. S. C. 420), despite the specific provision of that Act excluding from its scope bona fide labor activities.

Appended hereto is a copy of the opinion of the District Court entered on August 1, 1945.

Respectfully submitted.

(Signed) HAROLD Judson,
Acting Solicitor General.

(Signed) EDMUND J. BRANDON,
United States Attorney for the District of Massachusetts.

APPENDIX

OPINION

August 1, 1945

SWEENEY, *J.* This is an indictment for conspiracy to violate Section 1 of the so-called "Kickback" Act,[1] 48 Stat. 948; 40 U. S. C. A., Sec. 276b. To this indictment the defendants have filed motions to dismiss on the ground that the indictment does not state an offense cognizable in law. Another indictment was returned against these defendants over a year ago, and demurrers and motions to quash were sustained and allowed. *United States* v. *Carbone, et al,* 56 F. Sup. 343.

At the time the alleged conspiracy occurred three of the defendants were officers of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America. The fourth defendant was employed by Local 39.

[1] Section 1 provides that, "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The indictment charges that, during the period of the alleged conspiracy, Coleman Bros., Inc. and John Bowen, Inc. were engaged in the construction of various public buildings for the United States at Fort Devens, Massachusetts, on a cost plus fixed fee contract, the contractors to furnish the materials, equipment and labor for the job; the defendants, by virtue of their positions in Local 39, made an agreement with the contractors under which the contractors undertook to employ as laborers on the job only those who were approved by the defendants, and to discharge any of those thus employed at the request of the defendants; the defendants approved to the contractors only members of the Union or such persons as paid to the defendants the sum of five dollars; the continued approval of the defendants was conditioned upon the payment of five dollars per week until the full amount of the initiation fee into Local 39 and the International Union had been paid; the defendants threatened to procure the discharge of any workers who failed to make the required payments; the defendants knew and intended that the workers would make the payments out of compensation earned.

In *United States* v. *Laudani*, 320 U. S. 543, a foreman, who had been vested by his employer with power to hire and discharge workers, was held to be indictable under Section 1 of the Kickback Act. In the course of the opinion the Court indicated the guides to be used in the interpretation of this section. Limitations were placed upon the broad scope of the literal meaning of "Whoever" in the statutory text. The essential

element which would bring a defendant within the operation of Section 1 was inferred to be an allegation that he had been "vested by the employer with power to fix and terminate the employer-employee status." The position of the foreman in the *Laudani* case in this regard is clear. It does not follow that these union officials similarly were vested with power to hire and fire. It is true that they could demand the exclusion of any worker who refused to meet the union requirements. However this constitutes, not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a collective bargaining agreement. These defendants do not stand in the shoes of the contractors; they represent an adverse interest.

I do not believe that either the history or the purpose of the Kickback legislation warrants an extension of its scope to include these defendants. Language from the Senate Report[2] quoted by Mr. Justice Black in the *Laudani* case to support the inclusion of foremen, serves equally to support the exclusion of union officials. The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution.

I am aware that there are decisions in other districts at variance with the views here ex-

[2] Mr. Justice Black stated that hearings before the Senate Committee on the Judiciary "had revealed 'that large sums of money have been extracted from the pockets of American labor to enrich contractors, subcontractors, and their officials'." *United States* v. *Laudani*, *supra*, p. 548.

pressed. *United States* v. *Fuller, et al.*, 51 F. Supp. 953; *United States* v. *Lombard, et al.*, 54 F. Supp. 537. However, I do not believe that they have reached the proper result.

The motions to dismiss the indictment are allowed.

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